Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-752

Certified Meats, Inc., and
Country Pride, Inc.,.....Petitioners

v.

National Labor Relations Board..Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Certified Meats, Inc., and Country Pride, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 13, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 13, 1979, and this petition for certiorari was filed within ninety (90) days of that date. This Court jurisdiction is invoked under 28 U.S.C.§ 1254 (1).

QUESTIONS PRESENTED

1. Whether the decision of the National Labor Relations Board is manifestly against the weight of the evidence.

2. Whether the hearing conducted by the Administrative Law Judge was biased and whether such a hearing is a denial of due process.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C.[and Supp V] 151, et seq are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities...
>
> Sec. 8 (a) It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

STATEMENT OF THE CASE

On October 17, 1972, the National Labor Relations Board issued its Decision and Order directing Respondent, Certified Meats, Inc., to reinstate certain of their employees and make them whole for wages lost due to discrimination by the Respondent, Certified Meats, Inc. The

Court of Appeals for the Seventh Circuit enforced this order as against Certified Meats on August 3, 1973. On April 8, 1976, the Regional Director of Region Twenty-five issued a Back Pay Specification and Notice of Hearing to Certified Meats, Inc. The Specification was answered by Certified Meats on May 13, 1976, and an amended answer to same was made on May 24, 1976. The Regional Director on August 2, 1976 amended the original Back Pay Specification and Notice of Hearing to include Respondent, Country Pride, Inc. It was alleged in this amendment that Country Pride was a successor to Certified Meats and liable for any Back Pay due the discriminatees. Country Pride moved to be dismissed from the proceedings and filed an answer denying its successorship. The motion was never ruled upon.

On February 15, 16 and 17, 1977, hearing was had on the Back Pay Specification before the Honorable James T. Youngblood in Fort Wayne, Indiana. Evidence was presented herein. During the course of the proceedings, Administrative Law Judge Youngblood withdrew himself from hearing the case. He, however, reconvened the hearing and continued to hear evidence. Further, while conducting the hearing, Judge Youngblood repeatedly interrupted Respondent's counsel's cross-examination. The Administrative Law Judge required briefs which were submitted by Certified Meats, Inc. and Country Pride, Inc., on April 18, 1977, and by General Counsel on April 14, 1977. Judge Youngblood rendered his decision on January 23, 1978.

The contents of that decision culminated in an order running to both Certified Meats, Inc.,

and Country Pride, Inc., holding both jointly and severally liable and instructing payment by both to the discriminatees.

The petitioners made application for review in the U.S. Court of Appeals for the Seventh Circuit. An appellate review was held resulting in the July 13, 1979 decision. It is that decision which has prompted this appeal.

In the course of the original hearing the petitioners gave multiple explanations of the prevailing business and economic conditions and indicated why no transfer of an operative business was possible. The Board followed the recommendations of the Administrative Law Judge and chose to ignore the economic realties in favor of pursuing its goal of finding a remedy for the discriminatees.

REASONS FOR GRANTING WRIT

1. The decision below conflicts with the substantial volume of evidence as presented at the administrative hearing.

As provided under 29 U.S.C. § 160 E and 29 U.S.C. 160 (G), the findings of the National Labor Relations Board with respect to questions of fact shall be conclusive only if supported by substantial evidence on the record considered as a whole. It is the petitioners belief that such evidence is inconsistent with the decision returned.

The question of this evidence and successorship clearly indicates the original corporation, Certified Meats, Inc., was for several reasons incapable of transfering any live or operating business to Country Pride, Inc.

It was the direct and obvious intent of William D. Contris that all of the operations

of Certified Meats, Inc., end. Towards the realization of that purpose the ownership of the company was transfered to another party for no more than the assumption of existing indebtedness. It is apparent that there was no vital operation of the business of Certified Meats, Inc., there can be no successor to any business unless there is something to which that second corporation can succeed.

It is recognized that an employer has a right to terminate his business for whatever reason he may choose. This principle is established in Textile Workers v. Darlington Manufacturing Co., Inc., U. S. Sup. Ct. 1965 38 LRRM 2657.

The facts of this case as indicated in the record clearly indicate that Certified Meats, Inc. was defunct at the time of its transfer and that its vitality or life's breath had ceased.

In insisting upon finding Country Pride, Inc. as a successor corporation the National Labor Relations Board is attempting to use an innocent party as the means for the realization of a goal that the realities of the business world had rendered impossible.

With the demise of Certified Meats, Inc., the decision of the Board became unenforceable. Such was the case in NLRB v. Grace Co., 184 f. 2d 126, 26 LRRM 2536 (8th Cir 1950) where it was held that termination can serve to end the employers obligation and in this case the facts can hardly suggest otherwise.

We confess an undeniable repugnance for this entire question of successorship. This "visiting the sins of the father" approach flies in the face of our natural inclination to attribute guilt only to those who have actively or passively commited some wrong. There may be some justification for using the question of successorship as an enforcement tool but it must not be allowed to

to ignore or deny the facts of economics, to insist upon using a second corporation as a means of achieving the Board's end when no other means are available. It must be applied to situations in which there is a genuine successorship, where there is clearly an intent to transfer a living and functioning business entity. To allow the title of successor corporation to be applied without the proof of such transfer would enable the Board to attach any purchaser of materials or equipment from a defunct corporation and to impose liability for acts that they did not perform and over which they had no control.

The matter of successorship as a weapon in the hands of the National Labor Relations Board represents a terrifying threat to the transfer of any property or interest of every company in this nation which experiences labor difficulties.

The use of successorship must be narrowed so that the facts of a given situation indicate a clear intent to transfer an operative, if not operating, business.

An examination of the record of the case below, in its entirety, fails to demonstrate that such an intent was present in this case. Rather, it suggests the opposite. It establishes that no living business was transfered, that business and material conditions existing at the time of the alleged transfer prevented any transfer of such a living business.

This issue stands awaiting resolution. Its impact continues well beyond the confines of this particular case. Now is the time to check this abuse at the hands of the National Labor Relations Board.

2. The decision below denies the due process of law.

One of the traditional strength of the American form of government has been the division of that government into executive, legislative and judicial branches with appropriate restrictions upon each branch provided by the nature and operations of the other branches.

Administrative law by its very nature blurs the distinctions which traditionally have served as checks and balances in the operation of our government. There may be acceptable reasons for such a blurring but it remains a fact that when such a blurring occurs there arises the clear possibility, if not certainty,that the rights and privileges inherently protected by the division into branches (and checks and balances) if they are to survive, must be protected by some other means.

It is precisely for that purpose that we seek the review of this matter by the Supreme Court.

The operations of the National Labor Relations Board while ostensibly conducted under the classification of civil actions place the authority, power and means of the United States Government directly in conflict with individuals and businesses. In many respects the actions of the National Labor Relations Board more accurately resemble criminal investigations and prosecutions than our traditional civil actions.

As indicated in Marshall v. Barlow's Inc., 98 S. Ct. 1816 (1978) there is a recognition by the court of the need to place restrictions upon the actions of federal administrative bodies in the conduct of their activities. The reason is fundamental. The constitutional guarantees were created expressly to limit the infringement of

individual liberties by government. The change in form and method which is apparent in the tendency towards administrative versus judicial reconcilliations does not eliminate the need for constitutional protections against government. Perhaps the subtleties of administrative actions increase that need.

In this special case we are faced with a situation in which the National Labor Relations Board acts both in an executive and judicial capacity. Our concern in this is that the actions of the Board in its judicial capacity does not provide the necessary constitutional guarantee of due process owing to the actions and expressed bias of the Administrative Law Judge.

It is not alleged that the proceedings were of a criminal nature. It is alleged that the proceedings owing to the position and power of the National Labor Relations Board denied the petitioners a fair and impartial hearing.

Specifically, the petitioners are concerned by the continued and repetitive interruptions by the Administrative Law Judge and the resulting denial of effective cross-examination. We are also concerned with the bias of the Administrative Law Judge as admitted in his withdrawal in the case and then as denied by his reconvening and hearing of the case.

In that hearing the Administrative Law Judge served as the trier of legal issues as well as the trier of fact.

As indicated in Rosenblum v. Rosenblum, 42 N.Y.S. 2d 626, 181 Misc. 78 (1942):

> "The due process of law provision of this Amendment (the 14th) and Amendment 5 guarantees to every person his day in court and reasonable opportunity to be heard or defend and it requires orderly proceeding in competent

tribunal in accordance with generally established rules not violative of fundamental rights."

It is the position of the petitioners that the proceedings before the Administrative Law Judge denied the petitioners of the fundamental rights to adequately present a defense, to properly cross-examine witnesses and to have a fair and impartial hearing. The proceedings were such that the Administrative Law Judge by his actions of interruption and withdrawal and reconvening denied the petitioners of the required objective proceedings necessary for a fair and impartial hearing.

Consider the matter of U.S. ex rel Montgomery v. Ragen, 86 f. Supp. 383, D. C. Ill. (1949):

> "Due process of law identifies itself with due course of justice and means not only the due conviction and punishment or the due acquittal and discharge of an accused person, as justice may require, but it also means the due course of proceedings, in the administration of justice."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued May 21, 1979)

July 13, 1979

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. JOHN W. PECK, Senior Circuit Judge*

Hon. HARLINGTON WOOD, JR., Circuit Judge

CERTIFIED MEATS, INC., and COUNTRY PRIDE, INC.,		
	Petitioners	Petition for
No. 78-1807	v.	Review of an Order of the
NATIONAL LABOR RELATIONS BOARD,		National Labor Relations Board
	Respondent	

ORDER

Certified Meats, Inc. (Certified) and Country Pride, Inc., (Country Pride) (the Companies) petition this court to review and set aside a supplemental decision and order of the National Labor Relations Board, 235 N.L.R.B. No. 184 (1978), and the Board cross-applies for the enforcement of the order. In 1972 the Board found

that Certified violated Section 8(A) (3) and (1) of the National Labor Relations Act by the company's discriminatory discharge of eleven employees. Certified Meats, Inc., 199 N.L.R.B. 775 (1972). The Board's order required, inter alia, that Certified offer reinstatement to two employees and make whole those employees, as well as nine other employees who had already been offered reinstatement, for any of loss of earnings suffered because of the unlawful discharges. In 1973 this court enforced the Board's order, NLRB v. Certified Meats, Inc., No. 73-1096 (7th Cir. 1973), and in April 1976 the Board's Regional Director issued a back pay specification and notice of hearing against Certified detailing the amounts of money claimed as due to the employees. In August 1976 the Regional Director amended the back pay specification and notice of hearing alleging that Country Pride, by acquiring and continuing the business of Certified , was a successor to Certified and was therefore jointly and severally liable for remedying Certified's unfair labor practices. After a hearing an administrative law judge concluded that Certified and Country Pride were jointly and severally responsible for remedying the unfair labor practices and making whole the employees in the amount of about $15,000.00. 1/ On May 1, 1978, the administrative law judge's decision was adopted by the Board.

The petitioners raise two issues on appeal: (1) whether substantial evidence in the record as a whole supports the Board's finding that Country Pride is a successor employer, and (2) whether Certified and Country Pride were denied due process by the administrative law judge's conduct of the hearing.

I.

The Supreme Court ruled in Golden State Bottling Co. v. NLRB, 414 U. S. 168, 180-84 (1973), that the Board may require a bona fide purchaser to reinstate with back pay employees unlawfully discharged by a predecessor employer where the successor employer: (1) acquires the employing enterprise with notice of the unfair labor practice, and (2) retains "substantial continuity of the identity in the business enterprise." The latter requirement may occur when the successor employer acquires substantial assets of the business enterprise and continues, without interruption or substnatial change, the business operations of the predecessor. Id. at 184.

The companies contend that there was an insufficient showing of successorship under the second requirement of Golden State. 2/ They claim that: no operations were conducted for over 30 days at the Fort Wayne, Indiana facility, the very nature of the essential operations was different because Certified produced only diced beef while Country Pride produced beef short ribs in large amounts and diced beef in small amounts as a by-product of short ribs, only two employees were common to both companies, and the corporate entities were incorporated in different states. 3/

The Board argues, first that Country Pride acquired the business and substantial assets of Certified with notice of Certified's unfair labor practices. Second, the Board asserts that Country Pride maintained a "substantial continuity of identity" in the business enterprise. We agree with the Board.

The record shows that when Certified began operations in 1971 in Indiana, William D. Contris, Karen Sue Hufford and their attorney were

Certified's incorporators and Board of Directors. Contris served as Certified's president and Karen Hufford was the secretary-treasurer. Contris owned 100 per cent of the Certified stock. The acquiring company, Country Pride, was incorporated in 1972 in Ohio. Contris owned, and still owns, 400 of the 600 shares, or two-thirds, of Country Pride's stock and Karen Hufford's brother, Steven Hufford, owns the remaining 200 shares. At the time of the back pay hearing, Karen Hufford was Country Pride's president and Contris was the secretary-treasurer. Moreover, Contris, along with Karen and Steven Hufford, were all witnesses at Certified's unfair labor practice hearing. The record also shown that Country Pride acquired substantially all of Certified's physical assets in 1973, including Certified's compressors, refrigeration units and incinerator. The lease continued in Certified's name and the utilities remained billed to Certified. Country Pride, meanwhile, assumed Certified's rent and utility payments for the Fort Wayne plant. Further, Country Pride continued to use Certified's Department of Agriculture Inspection Number, 6900, until 1975 when operations closed at the Fort Wayne plant. The fact that Country Pride hired employees from Certified supports, rather that upsets, the finding of substantial continuity of the business enterprise. Last, we, like the administrative law judge, are unpersuaded by the Companies' contention that there was no substantial continuity under Golden State because Certified produced only diced beef while Country Pride produced beef short ribs in large amounts and diced beef in small amounts. This is a distinction without a significant difference. Each

company was engaged in beef processing; Country Pride continued to produce large quantities of diced beef--38,000 pounds in one instance; and Country Pride continued to sell diced beef to some of the same customers.

We have carefully and thoroughly examined the record as a whole and we conclude that substantial evidence supports the Board's finding that Country Pride is a successor employer.

II.

The companies claim in their brief that because the administrative law judge "continually interrupted respondent's counsel's cross-examination of National Labor Relations Board witnesses," the Companies were denied the right to a fair hearing, the right to effective counsel and the right to confront witnesses. The petitioners, however, are unable to cite a single authority in direct support of the assertions and they fail to point out a specific instance where the administrative law judge prevented counsel from obtaining testimony from a witness. The administrative law judge on occasion interrupted both the petitioners' and respondent's questioning of witnesses, but the record does not show, and the petitioners do not allege, that the examiner was hositle, biased or prejudiced in either his questions to the witnesses of his findings of fact. See generally, NLRB v. Air Flow Sheet Metal, Inc., 396 F.2d 506, 508 (7th Circ. 1968); A.O. Smith Corp. v. NLRB, 343 F.2d 103, 110 (7 Cir. 1966). We have examined the record as a whole and, finding no unfairness in the hearing, we will not order a new hearing.

The Board's order of May 1, 1978, adopting the administrative law judge's supplemental decision, is enforced.

*Honorable John W. Peck, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

1/ The administrative law judge, and later the Board, ordered that Certified and Country Pride pay back pay, plus interest, to ten of the eleven employees unlawfully discharged by Certified. The eleventh employee was not found entitled to back pay.

2/ The Companies have not contested the Board's finding that Country Pride acquired Certified with notice of Certified's unfair labor practices.

3/ The Companies also assert that the Board had not demonstrated that the acquisition by Country Pride was inspired by Certified's desire to circumvent the Board's order. The Supreme Court has made it clear that no such showing is necessary in proving successorship. Golden State Bottling Co. v. NLRB, 414 U.S. 168, 176-177 (1973).

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 1979, three (3) copies of the Petition for Writ of Certiorari were mailed postage prepaid to Elliot Moore, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D. C. and three (3) copies to Solicitor General, Department of Justice, Washington, D. C. 20530.

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OCTOBER TERM, 1979

No. 79-752

Certified Meats, Inc., and
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v.

National Labor Relations
Board.....Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SUPPLEMENTAL APPENDIX

235 NLRB No. 184

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CERTIFIED MEATS, INC., and
COUNTRY PRIDE, INC.

and Case 25--CA--4428

LOCAL P--215 AMALGAMATED
MEAT CUTTERS & BUTCHER
WORKMEN OF NORTH AMERICA,
AFL--CIO

SUPPLEMENTAL DECISION AND ORDER

On January 31, 1978, Administrative Law Judge James T. Youngblood issued the attached Supplemental Decision in this proceeding.1/ Thereafter, Respondents filed exceptions and supporting briefs. The General Counsel filed limited exceptions and a brief, and Respondents filed an answer to the General Counsel's limited exceptions.

Pursuant to the provisions of Section 2(B) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

1/ The Board's original Decision and Order is reported at 199 NLRB 775 (1972.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has deceded to affirm the rulings, findings, and conclusions2/ of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Certified Meats, Inc. and its successor, Country Pride, Inc., Fort Wayne, Indiana, their officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

Dated, Washington, D. C. May 1, 1978

John H. Fanning,Chairman

Howard Jenkins,Jr.Member

(SEAL) John A. Penello,Member

NATIONAL LABOR RELATIONS BOARD

2/ In their exceptions Respondents allege that the Administrative Law Judge's conduct of the hearing demonstrated prejudice against Respondents and denied Respondents their right to effective counsel. We have carefully examined the record in its entirety and we find no basis therein for finding that the Administrative Law Judge was biased against Respondents, or that

his conduct of the hearing denied Respondents' right to effective counsel and to a full and fair hearing on all issued.

JD-52-78

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD DIVISION OF JUDGES

CERTIFIED MEATS, INC.

and

Case No. 25-CA-4428

COUNTRY PRIDE, INC.

and

LOCAL p-215, AMALGAMATED
MEAT CUTTERS & BUTCHER
WORKMEN OF NORTH AMERICA,
AFL-CIO

John W. Gray, Esq, of
Indianapolis, Ind., for the
General Counsel.

Joseph DaPore, Esq.
(Navarre, Rizor & DaPore)
of Lima, Ohio, for the
Respondents.

SUPPLEMENTAL DECISION

Statement of the Case

JAMES T. YOUNGBLOOD, Administrative Law Judge: On October 17, 1972 the National Labor Relations Board (herein Board) issued its Decision and Order1/ in Case No. 25-CA-4428, directing Certified Meats, Inc., among other things, to offer reinstatement to employees Lesley McLain and Victor Frye, and to make them and nine other employees whole for any loss of earnings they may have suffered because of the unlawful discharges in violation of Sections 8 (a) (1) and 8 (3) of the Act. On August 3, 1973, the United States Court of Appeals for the Seventh Circuit filed its Decision enforcing in full the Board's Decision, including the backpay provisions of the Board's Order. On

1/ 199 NLRB 775

April 8, 1976, because of a controversy over the amounts of backpay due under the terms of the Board's Order the Regional Director of the National Labor Relations Board for Region 25 issued a Backpay Specification (herein Specification), against Respondent Certified Meats, Inc. (herein Certified).

On May 13, 1976, Respondent Certified filed an answer in which it admitted that the procedures to determine the back wages as set forth in paragraphs 1 through 7 of the Specification are the correct procedures for the determination of back wages. However, Certified denies for lack of knowledge the specific application to each and every employee. Additionally Certified denies, for lack of knowledge, because the Board had in its possession the payroll records of Certified of the separate specific computations for each employee as set forth in paragraph 8, subparagraphs I through XI. Also Certified denied paragraph 9 of the Specification, for lack of knowledge, which summarizes the net amount of backpay due each and every employee.2/

On August 2, 1976 the Acting Regional Director for Region 25 filed an amendment to the Backpay Specification and Notice of Hearing in which it alleged that Country Pride, Inc., (herein Country Pride) be made a party to this proceeding because on or about September 1973 Country Pride acquired the business of Certified with kn owledge of the outstanding National Labor Relations Board Order against Certified, and thereafter until about January 1975 continued the business formerly conducted by Certified without interr-

2/ On May 25, 1976, the General Counsel filed a motion to strike portions of

Certified's answer and deem the allegations of the Specification denied to be true. This motion and Certified's opposition were referred to the Administrative Law Judge for ruling. As it is true that the Board had in its possession Certified's payroll records I will deny the General Counsel's motion and let the answer stand.

---

uption or substantial changes in method of operation, employee complement or supervisory personnel; that by virtue of this acquisition Country Pride was at all material times a successor to Certified for purposes of the National Labor Relations Act and as such is liable for remedying the unfair labor practices of Certified including making whole the employees named herein by paying to them the amounts of backpay alleged herein, and that Country Pride is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

On August 4, 1976, Certified filed an answer to the amendment to the Backpay Specification wherein it denied the amendment in its entirety.

On August 9, 1976 Country Pride filed an answer in which it denies for lack of knowledge paragraphs 1 through 9 of the Backpay Specification and denied each and every allegation contained in the amendment to the Backpay Specification. Additionally Certified alleged that the allegations failed to state a claim upon which relief can be granted against Country Pride and that Country Pride has not been properly served with the original Backpay Specification and Notice of Hearing; that Country Pride has never been judicially determined to be a party or respondent to the underlying order and that status of a party or

respondent subject to the underlying order must be litigated and determined in enforcement proceedings. Such proceeding is now before Special Master in a related case. N.L.R.B. v. Certified Meats, et al., Case No. 73-1096, Court of Appeals Seventh Circuit. The answer also stated that as the issue of Country Pride's status as successor to Certified is at issue in that proceeding, and since that issue has been raised herein this cause should be abated as to Country Pride; that the litigation in the Court of Appeals must be concluded before a determination can be made that Country Pride is the successor to Certified Meats, and therefore the complaint should be dismissed in its entirety against Country Pride. On August 9, 1976, Respondent Country Pride also filed a motion for dismissal alleging substantially the same thing as it alleged in its answer.

On August 23, 1976 and February 15, 16 and 17, 1977 a hearing was conducted in this matter in Fort Wayne, Indiana. All parties were represented at the hearing and following the hearing the General Counsel, Certified and Country Pride, filed separate post-trial briefs. These briefs have been duly considered.

Upon the entire record, and my observation of the witnesses, the arguments made during the trial, and upon the briefs filed by the parties, I make the following: 3/

3/ The General Counsel's motion to correct the transcript in certain respects is granted, as it appears appropriate, and there are no objections.

Findings and Conclusions

There were 11 discriminatees that Respondent Certified Meats was ordered to make whole and pay backpay. I will take them up individually.

Charles Frye: His backpay period began at 12:06 p.m. on July 9, 1971 and ended on September 24, 1971 when he was offered reinstatement by the Respondent Certified. According to the Specification his gross backpay and expenses were $1,582.39 less interim earnings of $229.90 leave a net backpay of $1,352.49. In its post-trial brief Certified stated "The testimony of Charles Frye substantiated the claim set forth in the Specification (T-109 to T. 113)." Respondent Certified accepted the Board's position and agreed that net backpay owing to Charles Frye was $1,352.49.

Based upon the record evidence and the admission by Respondent Certified I conclude that Charles Frye is entitled to net backpay in the amount of $1,352.49 as set forth in the Specification.

Jerry Garman: Garman's backpay period began an 12:06 p.m. on July 9, 1971 and ended on September 3, 1971. His gross backpay was $1,127.73 and his net earnings were $115.38, making his net backpay $1,012.35.

In its post-trial brief Respondent Certified admitted that the testimony of Garman substantiated the Board's claim as set forth in the Specification. Respondent Certified accepted the Board's position and agreed that net backpay due and owing to Jerry Garman was $1,012.35.

In view of the record evidence and the admission by Respondent I conclude that Jerry Garman is entitled to net back pay in the amount of $1,012.35 as set forth in the Specification.

William Longerbone: Longerbone's backpay period began at 12:06 p.m. on July 9, 1971 and ended on September 29, 1971. According to the Specification Longerbone's gross backpay was $1,576.80 with interim earnings, less expenses, of $192.81, making a new backpay of $1,383.99.

In its post-trial brief Respondent Certified admitted that the testimony of William Longerbone substantiated the allegations of the Specification. Respondent Certified accepted the Board's position and agreed that net backpay due and owing to William Longerbone is $1,383.99.

Therefore, in view of the record evidence and the admission by Respondent Certified I conclude that William Longerbone is entitled to net backpay in the amount of $1,383.99, as set forth in this Specification.

Harris Hoeffel, Jr.: His backpay began at 12:06 p.m. on July 9, 1971 and ended on September 3, 1971. The Backpay Specification alleged that Hoeffel's gross backpay was $1,127.73; that he had no earnings, making his net backpay $1,127.73. At the hearing Hoeffel testified that he worked for a company called "Top of Indiana" in Fort Wayne, Indiana as a casual laborer, and although he was not sure exactly what he made he estimated that he made between $50.00 and $100.00. At one point in his testimony he stated that he did not make $100.00, $85.00 would be pretty close.

At the hearing the General Counsel moved to amend the complaint to show interim earnings in the amount of $50.00 and expenses in the amount of $4.70 which had been placed in the original specification but because there were no interim earnings it could not be deducted from interim earnings. The complaint was amended without objection.

In its post-trial brief Respondent Certified took the position that $85.00 rather than the $50.00 alleged by the General Counsel, should be added to Harris Hoeffel, Jr.'s interim earnings. That with this $85. deducted from the $1,127.73 they accepted the net backpay owing Harris Hoeffel, Jr., in the amount of $1,042.73. Respondent Certified makes no mention of the $4.70 expenses which should be deducted from the interim earnings.

In view of the testimony of Harris Hoeffel, Jr. that $85. would be pretty close to his interim earnings at Top of Indiana I accept Respondent Certified's position that his interim earnings were $85. rather than $50. the minimum amount alleged by the General Counsel. In accepting this figure however, I will deduct therefrom the $4.70 expenses as set forth in the Backpay Specification. Therefore, I conclude that after deducting $4.70 expenses from the $85. interim earnings that Harris Hoeffel, Jr., is entitled to net backpay in the amount of $1,047.43.

Donald Freeman: Donald Freeman's backpay period is from 12:06 p.m. July 9, 1971 through September 17, 1971 when he was reinstated. His interim earnings were $67.20 less expenses of $3.80 leaving a net backpay claim of $1,281.14.

Respondent Certified does not question this net backpay figure, however, because Freeman testified that he was unavailable for work for a period of time approximating 2 to 6 weeks, as alleged by Respondent, interim earnings for a 6-week period should be deducted from the net backpay claimed by the General Counsel in the Specificiation. Thus Respondent argues that the normal recovery period for a soft tissue back injury is 6 weeks, therefore 6 times 40 hours equals 240 hours and at $3.00 per hour this would be $720.00. Respondent admits owing Donald Freeman backpay in the amount of $561.24.

In early Board decisions it was a general rule that claimants were not allowed backpay during any period of disability regardless of the cause. In American Manufacturing Company, 167 NLRB No. 71, the Board took a closer look at its past practices and there determined that it would make a difference between periods of incapacity because of illness and periods of incapacity because of some disability resulting from interim employment. Thus the Board stated:

> It is thus apparent that the practice of disallowing backpay with out inquiry as to the nature of the physical disability, the cause thereof, the probability of similar illness in the respondent's employ etc., may be convenient but is not always equitable. Rather, we think that equity and reason require that periods of unavailability for work because of illness or accident must be considered on a case-by-case basis. Where an interim disability is closely related to the nature of the interim employment or arises from the unlawful

> discharge and is not a usual incident of the hazards of living generally, the period of disability will not be excluded from backpay.

Donald Freeman testified that he worked at a company called County Line Cheese and made interim earnings of $67.20. The itemized statement of earnings from the Social Security Administration for the period of July through September of 1971 indicates that Freeman had interim earnings of $67.20. On cross-examination Freeman testified that at the County Line Cheese Company he had a job of weighing cheese whey, powdered cheese, in 100 pound bags. On his last evening there he received an injury to his back while he was twisting around to put the 100 pound bags on pallets. He went to see a chiropractor and was told not to return to that work because he had re-injured an old injury and had torn his back loose again. He testified that he was out of work for at least a week and maybe more than a week. Freeman testified that he filed an industrial claim, however, he received no money in the form of wages or as a result of the injuries. The insurance carrier did, however, pay the doctor bill. The Respondent contends that 6 weeks pay must be deducted from the net backpay claimed by the General Counsel in the Specification. In support of its position the Respondent states that an injury of this type takes at least 6 weeks to recover, therefore, it claims 6 weeks of the backpay should be tolled.

In view of this it makes no difference whether Freeman was out of work for a 2-week period or a 6-week period as his injury was an industrial accident resulting from his interim employment. Therefore, in view of the Board's Decision in American Manufacturing

Company, no period of the backpay is tolled as a result of this disability resulting from interim employment. Therefore, I conclude that Freeman is entitled to net backpay in the amount of $1,281.14, as set forth in the Specification.

Victor Frye: Victor Frye's backpay period begins at 12:06 p.m. on July 9, 1971. On September 24, 1971 he was offered reinstatement by Certified. As found in the prior decision be accepted reemployment and returned to work on October 5, 1971. Also as found in the prior decision he was again discriminatorily discharged on October 7, 1971, and so far as this record indicates he was never offered reinstatement thereafter. Initially the General Counsel argued that the backpay due Victor Frye would run to the present time as he was never offered reinstatement, however, in his brief the General Counsel agrees that since September 14, 1973, Frye's interim earnings exceeded what his gross backpay would have been and he would be not entitled to backpay. Therefore, it is my conclusion that the backpay of Victor Frye terminates on September 14, 1973.

In the Backpay Specification the General Counsel alleges that during the third quarter of 1971 Frye had gross backpay of $1,001.96, and no net earnings leaving him a net backpay of $1,001.96. To this figure Respondent has no objection, however, it argues that Frye's backpay should be terminated at the end of that quarter because of the fact that it offered reinstatement on September 24, 1971. Respondent Certified completely ignores the fact that Frye was discriminatorily discharged again on October 7, 1971 and was never offered reinstatement thereafter. During the fourth quarter of 1971

the Specification alleges that Frye's backpay was $891.50 and he had net earnings of $240.55 leaving a net backpay of $650.95.

The evidence reflects that Victor Frye at all times material herein made diligent search for work and in fact finally found work and earned over $30,000.00 in 1974 and $59,000.00 in 1975. The Respondent offered no evidence to indicate that at all times material herein, Victor Frye did not make a diligent search for work to lessen the employer's burden of backpay. As the Respondent offered no evidence to refute the allegations in the Specification and as the evidence indicates, as stated, that Frye's net backpay for the fourth quarter of 1971 was $650.95 I so find.

The Backpay Specification alleges that during the first quarter of 1972 Frye's gross backpay was $942.20 and he had net interim earnings from Mayflower Mills in the amount of $534.08. As there was no evidence offered to refute these figures and as the evidence presented supports these figures, I conclude that his net backpay for that period, that is, the first quarter of 1972 was $534.08. The Backpay Specification alleges that for the second quarter for 1972 his gross backpay was $1,052.63, and he had no net earnings, leaving him a net backpay of $1,052.63. As no evidence was offered to refute these figures and as the evidence in the record indicates that these figures are accurate it is my conclusion that he had net backpay for that calendar quarter of $1,052.63

The Backpay Specification alleges that during the third quarter of 1972 Frye had gross backpay of $1,137.87 and that he had interim earnings of $711.50 at Mayflower Mills leaving him a net backpay of $426.37.

These interim earning figures were derived from a report from the Social Security Administration which stated that Frye was employed by Mayflower Mills during the third quarter of 1972. Frye testified however that he was not employed by Mayflower Mills during that period but was employed by Mayflower Mills only during the first quarter of 1972. His testimony was supported by a representative of Mayflower Mills who testified that Frye worked for them only during the first quarter of 1972 and earned $408.12. After having an opportunity to review his income tax report for the year 1972, Frye testified, and his tax report showed, that he earned $1,260.71 while employed at International Harvester. This fact was not reflected on the Social Security form nor was it contained in the Specification.

Frye testified that he worked for Mayflower Mills only one time and that the Social Security form was in error where it reflected that he worked for Mayflower Mills in the third quarter of 1972. He testified however that he did work for International Harvester and made the $1,260.71 as alleged. He did not recall the exact period, but he thought he worked there in the third quarter of 1972 and the fourth quarter of 1972. 4/

4/ In an attempt to explain the discrepancy in the Social Security form where it stated that Frye worked for Mayflower Mills in the third quarter of 1972 and earned $711.50 the General Counsel contacted International Harvester for clarification. The General Counsel reported that the records of International Harvester showed that Frye earned $1,260.71 in 1972; that $711.50 was earned in the third quarter of 1972 and $549.21 in the fourth quarter. The Respondent refused to accept

these figures on the statement of the General Counsel and therefore they were not admitted.

Based on the testimony of Frye that he did work for International Harvester during the latter part of 1972 and the fact that the testimony clearly shows that he worked for Mayflower Mills only during the first quarter of 1972, it is my conclusion that in the third quarter of 1972 he earned $711.50 at International Harvester and that this is the figure that is shown on the Social Security form, but with the wrong employer named. As he also only worked for International Harvester one time, the remainder of the $1,260.71 would have to have been earned in the fourth quarter of 1972 leaving his earnings in that period of $549.21.

Therefore it is my conclusion that during the third quarter of 1972 Frye had gross backpay of $1,137.87, and net earnings of $711.50 leaving him a net backpay of $426.37. I also find that during the fourth quarter of 1972 the gross backpay of Frye was $1,451.38, as set forth in the Specification and that he had interim earnings of $124.30 from the Fort Wayne Safety Cab Corporation and $549.21 from International Harvester making a total interim earnings for that quarter of $673.41, therefore his net backpay for that period would be $777.97.

During the first and second quarter of 1973 Frye's net interim earnings exceeded his gross backpay therefore there is no backpay claimed for that period in the Specification. For the third quarter of 1973 the Backpay Specification alleges that Frye had gross backpay in the amount of $1,587.40 and that his net interim earnings were $1,135.97 leaving a net backpay of $451.43. The

Respondent offered no evidence to refute these figures and as the evidence demonstrates that these figures are accurate it is my conclusion that Frye had net backpay during the third quarter of 1973 in the amount of $451.43.

As indicated previously from September 14, 1973 Frye's interim earnings exceeded his gross backpay and therefore there is no claim for backpay after September 14, 1973. It is therefore my conclusion that Victor Frye is entitled to net backpay in the amount of $4,895.39 and I so order.

Matt Hoeffel: Matt Hoeffel's backpay period begins at 12:06 p.m. on July 9, 1971 and ends on September 3,1971 when he was offered reinstatement. The Backpay Specification alleges that Hoeffel's gross backpay was $1,127.73; that he had no interim earnings during that period leaving him with net backpay of $1,127.73. Hoeffel testified that he made a diligent search for work but was unable to find any employment during this period. Respondent Certified argues that Hoeffel is not entitled to backpay because he was not available for work during the backpay period. In support of its position Respondent relied on the fact that during part of this time Hoeffel was on strike duty, that he played a lot of tennis during this period and that he assisted his father in the remodeling of a slaughtering plant. Additionally, Certified contends that his brother Harris Hoeffel, Jr. testified that Matt was employed with his during the bakcpay period at the Top of Indiana Beef and that his earnings were not reported. Contrary to the argument made by the Respondent there is nothing in the testimony of Matt Hoeffel or otherwise in this record that would indicate that Hoeffel was not available for

work during the backpay period. He did make a diligent search for work and it is a fact that he did picket on behalf of the Respondent during this period, but he was available for work at all times. Additionally, while the testimony is somewhat clouded on this point, he may have helped his father in the cleaning of the slaughterhouse during this period, however, nothing in this record indicates that if he was offered employment he would not have been available. He denies however, that he worked at Top of Indiana and he said that his brother must have been mistaken when he made this statement. In reviewing the testimony of Harris Hoeffel, Jr., Matt's brother, at one point he does indicate that his brother did work along with him at Top of Indiana Beef during the backpay period, however, later on in his testimony he states that he is not a 100 percent sure that his brother did work there, that this was 6 years ago and he cannot remember. He then stated, "He worked there, but I don't know if it was a time we were laid off, or if it was a different time." From this testimony I cannot conclude that Matt Hoeffel was actually employed at the Top of Indiana Beef during this backpay period. He denies that he worked there and I accept that testimony. As I find nothing in the record which would indicate that Matt Hoeffel was not available for work during this backpay period, it is my conclusion that Matt Hoeffel is entitled to net backpay in the amount of $1,127.73.

Harris Hoeffel, Sr.: The Backpay Specification alleges that Harris Hoeffel, Sr.'s backpay period began at 12:06 p.m. on July 9, 1971 and ended on September 10, 1971. 5/ According to the Specification

5/ The reinstatement letter to all three of

the Hoeffels was sent on September 1, 1971. Matt Hoeffel and Harris Hoeffel, Jr., accepted reinstatement and their backpay period ends on September 3, 1971. The letter offering reinstatement requested that they report for work within 1 week. Harris Hoeffel, Sr., did not accept reinstatement. The General Counsel does not explain why this Hoeffel is entitled to an additional week's backpay. While he may have been granted a work to report to work, this does not enlarge the backpay period. It is my conclusion that the backpay period ends when the letter of reinstatement is received. As it was mailed on September 1, 1971, it is reasonable to assume that it was received by September 3, 1971. Therefore, like the other two Hoeffels, I find that Harris Hoeffel, Sr.'s backpay period ended on September 3, 1971.

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his gross backpay during the third quarter of 1971, was $1,384.79 and he had net interim earnings of $1,078.72 leaving a net backpay of $306.70. Hoeffel along with 10 other employees, was discharged on Friday, July 9, 1971. At the time of his discharge he was making $3.40 an hour. The record reflects that on Wednesday, July 4, 1971, he was hired at Top of Indiana Beef at $3.60 an hour where he continued to work for an undetermined period of time.

The Social Security statement placed in evidence by the General Counsel indicates that Hoeffel's earnings in the third quarter of 1971 were $1,412.59 at Top of Indiana Beef. Although Hoeffel testified and the record reflects that he went to work at Top of Indiana Beef on July 14, 1971, he was unable to give any positive recollection as to when he quit there. Therefore, I cannot assume, as suggested by the General Counsel, that Hoeffel worked for Top of Indiana Beef through the entire month of September. It

is quite possible that Hoeffel was not working at Indiana Beef on September 3, or even September 10, 1971. In fact Respondent's Exhibit No. 10, which is a 3-page document filled out by Hoeffel and returned to the Board on November 22, 1971, reflects in Hoeffel's own handwriting that he worked for Top of Indiana Beef from July 14 to August 30. This document does not indicate when it was prepared only when it was received by the Board.

Under these circumstances, it is my conclusion that Hoeffel's interim earnings were greater than that which he would have earned at Certified and he is therefore not entitled to any backpay.

Harry Lung: His backpay period begins at 12:06 p.m. on July 9, 1971 and ends on September 17, 1971. Lung was offered reinstatement by a letter from Certified dated September 14, 1971. He refused reinstatement. In the Backpay Specification the General Counsel concedes that from July 15 through July 30 Lung was out of the labor market, due to an auto accident, and he has excluded this period from the backpay period. The Specification indicates that Lung would have worked 345.54 hours at Certified Meats during his backpay period and at $2.65 an hour his gross backpay totals $915.68.

Lung testified that he had no earnings during the period July 9 to September 17, 1971. The statement from the Social Security Administration corroborates his testimony that he had no interim earnings during this period. However, Lung testified at several points that he went to work for the Dana Corporation around the time that he received

the letter from the Company offering his reinstatement. At another point in his testimony he testified that he knew he was hired at the time he received the letter from Certified and that is why he did not accept reinstatement. At another point in his testimony he testified that it could have been around the first of September 1971, that he was employed by the Dana Corporation. At another point in his testimony, after having looked at the Social Security Administration statement, he said that it must have been after October that he was employed by Dana Corporation. It was apparent from Lung's testimony that he did not know or could not recall the exact date on which he was employed by the Dana Corporation. This is understandable in view of the lapse of 6 years from that point in time. The Respondent accepting Lung's testimony that he was employed by the Dana Corporation on September 1, 1971 argues that his backpay should stop at that time. I do not agree.

It is true that Lung's testimony was confused and that he did not know when he was actually employed by Dana Corporation. However the Social Security Administration statement was admitted into evidence without objection and it clearly indicates that there were no earnings for Lung during the third quarter of 1971, except for that from Certified Meats. While these statements from the Social Security Administration are not always accurate, there is nothing in this record other than the confused testimony of Lung that would indicate that he was working for anybody during the third quarter of 1971 other than Certified Meats. The burden is upon the Respondent to show mitigation of damages and interim earnings and if Lung had

in fact worked for the Dana Corporation during the period of backpay and the month of September, it would have been a simple matter for the Respondent to have called some official from the Dana Croporation to so testify.6/

Certified also argues that the period of time that Lung who was out of the labor market as a result of the automobile accident should be long than a 2-week period. It argues that it should be 6 weeks. The General Counsel concedes and the record adequately establishes that Lung was in the hospital from July 15 to July 30 thereby removing himself from the labor market during that period of time and no backpay is sought for that period. The Repondent points to testimony by Lung on cross-examination where he was asked if he made a claim against the insurance company. Although Lung indicated that he made a disability claim against the insurance company and it could have been for as much as 6 weeks, his other testimony indicates that he was not out of the labor market that long. He testified that following his release from the hospital he was an outpatient and that on one occasion the week after he was released his mother had to drive him to the hospital. He indicated that he probably could not have worked that week. But he also indicated that he believed he would have been able to work from there on. Although Lung might have made an exaggerated claim for disability to the insurance company larger than his actual disability, this does not in fact establish that he was disabled for that period of time and, I so find.

6/ Although not admitted as evidence, during a lunch recess counsel for the General Counsel made a telephone call to the Dana Corporation

and was informed that Lung did not work for the Dana Croporation at any time during September, 1971.

However, in view of Lung's own testimony, it is my conclusion that his disability should extend beyond the 2-week period in the hospital and should cover the week following his release, and that this week should be deducted from the backpay as set forth in the Specification. In all other respects it is my conclusion that the General Counsel has satisfied his burden of establishing the net backpay due Harry Lung and that Respondent Certified has failed to meet its obligation to mitigate damages as suggested in its brief.

Accordingly I shall deduct 1 week from the backpay, as calculated by the General Counsel, in the amount of $106. leaving net backpay due Harry Lung in the amount of $809.68. It is therefore my conclusion that Harry Lung is entitled to net backpay in the amount of $809.68.

Lesley McLain: The Backpay Specification alleges that McLain's backpay period began at 12:06 p.m. July 9, 1971 and continues to the present time as there is no evidence Respondent ever offered reinstatement. In fact in Certified Meats, Inc., 199 NLRB 775, the Administrative Law Judge on page 778 specifically found that McLain had not been offered reinstatement. At the time of his discharge McLain was making $3.00 per hour. The Backpay Specification alleges and the record establishes that in accordance with pay increases given other employees of Respondent in similar jobs, McLain's pay on January 1, 1972, would have increased to $3.60 an hour, on April 1, 1972 to $3.70 an hour, on July 1, 1972 to $3.95 an hour and on January 1, 1973 to $4.00 an hour. These facts

are adequately demonstrated by the payroll records submitted in evidence by the General Counsel.

The Backpay Specification sets forth that for the third calendar quarter of 1971 McLain's gross backpay would have been $1,624.80 that the net interim earnings of $347.68 giving him a net backpay of $1,277.12. Respondent, Certified, does not question the backpay formula used by the General Counsel and does not question the gross backpay for the third quarter of 1971 as set forth in the Backpay Specification. The Respondent does however question the net interim earnings and the net backpay for that period. In this regard, the Respondent called as a witness Geraldine Tingley, the personnel coordinator for Essex Group Incorporated, a wholly-owned subsidiary of United Technologies, with divisional offices at Logansport, Indiana, and corporate office in Fort Wayne, Indiana. She testified from the employment records of Lesley McLain and from an employment application filed with the Essex Group Incorporated by McLain. According to these records McLain began work on September 1, 1971 and worked through September 20, 1971 at Essex Group Incorporated. The records showed no absenteeism so he would have worked everyday during that period. While employed at Essex Group Incorporated McLain made $2.42 an hour. Based on the employment application filed by McLain, as testified to by Geraldine Tingley, there is no question but this is the same Lesley McLain. The Social Security statement from the Social Security Administration indicates that during the third calendar quarter of 1971 McLain had earnings from a company called Trav/Plt, with an address given of South Airport Road, Transcity Michigan in the amount of $297.42.

McLain testified that this company is also known as Essex Wire and is located in Auburn, Indiana. The Social Security statement shows no earnings from a company called Essex Group Incorporated.

The Respondent contends that McLain was employed at Essex Group Incorporated from September 1, 1971 to September 20, 1971 as evidenced by the testimony and the records of the Essex Group Incorporated; that this is 14 working days and at $2.42 an hour converted to straight time amount to $271.04. Respondent further contends that these net interim earnings should be deducted from the net backpay as set forth in the Specification. Respondent further contends that no more backpay beyond that period is due McLain because he was fully employed and Certified had corrected its oversight by inviting him back to work. There is no evidence in this record that Certified ever invited McLain back to work or ever offered him reinstatement. In fact the evidence is to the contrary.

The General Counsel in its brief seems to ignore the testimony of Geraldine Tingley that McLain did in fact work at the Essex Group Incorporated. Geraldine Tingley was a forthright credible witness, and the documents she testified from did in fact contain a precise background of McLain's prior employment. The fact that this employment at Essex Group did not show up on the Social Security statement does not mean McLain did not work at this corporation. For one reason or the other these Social Security statements are not always accurate and reliable.

Under the circumstances, it is my conclusion that McLain did in fact work at

the Essex Group Incorporated as testified to by Geraldine Tingley; that he made $2.42 per hour, and that the period from September 1, 1971 to September 20, 1971 would be 14 working days and converted to straight time amounts to $271.94. It is my conclusion that Respondent has sustained its burden of showing additional interim income during the third calendar quarter of 1971, which should mitigate its damages. Therefore, I will deduct the $271.04 from the net backpay as set forth in this Specification, which will leave McLain's net backpay the third quarter of 1971 in the amount of $1,006.08.

The Backpay Specification further alleges that for the first quarter of 1972 McLain had gross backpay in the amount of $1,695.96, he had net interim earnings of $1,338.69 leaving a new backpay of $357.27. The Respondent did not question the gross backpay formula nor the net interim earnings as conceded by the General Counsel but merely argued that McLain was fully employed and that Certified had in fact corrected its oversight and offered him reinstatement. As I indicated earlier I find that McLain was not offered reinstatement and this record more than adequately demonstrates that. While there was no objection by the Respondent to gross backpay formula as used by the General Counsel it is my conclusion that the record herein, including the payroll records of the Respondent Certified adequately sets forth the correctness of the General Counsel's gross backpay formula. It is therefore my conclusion that Lesley McLain is entitled to net backpay in the amount of $357.27 for the first quarter of 1972.

The Backpay Specification also alleges that for the third quarter of 1973 through

September 14, 1973, Lesley McLain's gross backpay would have been $2,267.72 and that his net interim earnings during that period was $1,980.88, leaving a net backpay due McLain of $286.84. For the same reasons as given above for the first quarter of 1972 it is my conclusion that Lesley McLain is entitled to net backpay for the third quarter of 1973 in the amount of $286.84.

Although McLain was never offered reinstatement and his backpay could be computed to a later date, in its brief the General Counsel states that since the third quarter of 1973, McLain's interim earnings exceeded his gross backpay and therefore he is not entitled to backpay beyond that period. Accordingly it is my finding and conclusion that Lesley McLain is entitled to net backpay in the amount of $1,650.19.

John L. Thorpe: The Backpay Specification alleges that Thorpe's backpay period begins at 12:06 p.m. on July 9, 1971 and ends October 1, 1971. The Specification further alleges that Thorpe's gross backpay was $947.80, that he had no interim earnings, therefore his net backpay is $947.80. At the hearing the General Counsel amended the Backpay Specification to reduce the backpay period of Thorpe from October 1, to August 15, 1971 because Thorpe left the area on August 15, 1971 to return to school thereby taking himself out of the labor market. In his brief the General Counsel alleged that this limited Thorpe's hours to 244.91 that he would have worked at Certified during his backpay period, and at $1.75 per hour his gross backpay is $428.59. He had no expenses or

interim earnings therefore his net backpay is $428.59. Thorpe did not testify at the hearing because he was working in the West and would lose his job if he took any time off. Because of this, Respondent Certified contends that the General Counsel offered no evidence and therefore did not sustain the allegations in the Specification.

I do not deem the failure of Thorpe to show at the hearing and testify on behalf of the General Counsel as indicating a lack of evidence to sustain the allegations in the Backpay Specification. As indicated previously, Respondent Certified admitted that the procedures and the formula used by the General Counsel to determine the gross backpay were accurate. Certified's payroll records, placed in evidence by the General Counsel establish that Thorpe was fired along with the other employees on July 9, 1971 at 12:06 p.m. The prior Board Decision establishes that Thorpe received a letter offering reinstatement on September 24, 1971. As Thorpe was apparently out of the area at that time he did not accept reinstatement. At the hearing the General Counsel amended the Backpay Specification to reduce Thorpe's back pay period to August 15, 1971 because he had removed himself from the labor market. In view of these facts, the General Counsel has proven the date of the discharge and the date on which Thorpe's backpay terminates. Respondent was aware of the fact that Thorpe was not working when it sent him the letter of reinstatement on September 24, 1971. This clearly establishes the backpay period. The payroll records adequately demonstrate that Thorpe was making $1.75 at the time of his discharge and that his pay would not

have changed through August 15, 1971. As Thorpe would have worked 244.91 hours at Certified during his backpay period, based on the average hourly rate of other employees at the plant as set forth in G.C. Exhibit 1, Appendix, at $1.75 an hour his gross backpay would be $428.59. There were no expenses and there were no interim earnings. Additionally the Respondent offered no evidence to offset this net backpay of $428.59. The cases are clear that the General Counsel's burden of proof ends with establishing the gross backpay and any expenses incurred by the discriminatee. Any mitigation of damages such as willful refusing to work or not diligently searching for work or interim earnings are the responsibility of the Respondent. See NLRB v. Brown & Root, Inc., 311 F. 2d 447 (1963.

Although Thorpe did not testify, the General Counsel adequately sustained his burden of proof in establishing the gross backpay and conceding that there were no expenses incurred by John L. Thorpe.

Accordingly, it is my conclusion that John L. Thorpe is entitled to net backpay in the amount of $428.59.

The Alleged Successorship
of the Respondent Country Pride, Inc.

Certified Meats, Inc., began operations in February 1971 and at that time was engaged in boning hams. William D. Contris, Karen Sue Hufford, and their attorney, Mr. Benson were the incorporators and compromised the Board of Directors. Contris was listed on the articles of incorporation as the president and Sue Hufford was listed as the secretary-treasurer. Contris owned 100 percent of the stock of Certified Meats.

Country Pride was incorporated on April 20, 1972 in Creston, Ohio. Contris owns 400 shares of the 600 shares of stock in Country Pride and Steve Hufford, the brother of Sue Hufford, owns the remaining 200 shares. Contris was the secretary-treasurer at the time of the hearing, he has held various offices in Country Pride, Inc. Karen Sue Hufford testified that she was the president of Country Pride at the time of the hearing. When Country Pride originally commenced business it was engaged in the processing of pork such as Canadian bacon. In mid-1973 Country Pride, at its Creston, Ohio plant, converted to slaughtering and butchering horses for export.

Some time in the spring of 1973, in May or June, Contris met with Sue Hufford and they discussed her taking over the operation of Certified Meats. It was agreed that Contris would give the Certified Meats operation to Sue Hufford lock, stock and barrel without any consideration from her except that she accept all of the liabilities, including a $50,000.00 and a $15,000. promissory note. Contris was the maker of these notes and he remained as the maker on these notes although Hufford assumed their responsibility.

Some time around June of 1973, Sue Hufford took over the Certified operation and began a so-called "beef dicing" operation. Thus Certified sold a service only. People desiring to have their beef cut into small precise cubes would send their beef in trailer loads to Certified. Through the operation of several machines, one a slicing machine and the other a dicing machine, Certified would make the cubes

and return them to the owner receiving 10¢ a pound for its services. When Hufford took over the operation of Certified, she kept two employees Golden and Johnson as production employees and retained one additional employee as a janitor. She continued this operation through July 23, 1973 which was her last day of production. It appears from the record that during this time Country Pride was the sole and exclusive customer of Certified.

In July of 1973 because of the shortage of beef and because of some sort of beef strike, the operation at Certified began to be very tenuous and Hufford decided that she could not operate it any longer. In July of 1973 Hufford notified the U.S.D.A. or her local inspector that because of the beef strike, she would be unable to continue operation. At this point because she did not want to lose her two employees, she continued them working around the plant doing maintenance work. At that time it was her hopeful intentions that as soon as the beef strike was over she would get back into operations. She continued like this until about mid-September at which time Country Pride moved into the physical plant and began its operation of what is described as portioning short ribs. When Country Pride took over the operation it retained the two employees Johnson and Golden and their names continued to appear on the records of Country Pride as working at the Fort Wayne facility.

Although the lease and all utilities were continued under Certified Meat's name, Country Pride paid the rent and paid for the utilities. Additionally, Country Pride continued to use Certified Meat's U.S. Department of Agriculture Inspection

Number 6900. When, due to inactivity, that number was rescinded by the U. S. Department of Agriculture Sue Hufford, on February 21, 1974, wrote the Department of Agriculture at the behest of Contris and had the number reinstated. Thereafter it was used by Country Pride until it discontinued business in January of 1975.

While there was much testimony and examination of both Hufford and Contris as to whether Country Pride continued in the same operation as Certified in that it continued dicing beef using a mechanical dicer, it appears that in any event diced beef or stew meat was a by-product of the portioning of short ribs. Also it appears that some large quantities of diced beef were actually produced by Country Pride for Stouffer Foods. Thus, on one instance there were 38,000 pounds of meat diced, and as a by-product of short ribs would take a period of 3 months to accumulate. The record also reflects that the mechanical dicer was left on the premises and was there for use by Country Pride if it so desire. I cannot determine from this record whether Country Pride actually engaged in the mechanical dicing of beef following its takeover. However, I deem it unnecessary because in my view it continued in the processing of beef and whether it was dicing beef or making short ribs does not matter, it continued in the actual operation of the processing of beef. Moreover, the dicing of beef, although by hand, was a by-product of the short rib operation.

The record reflects that Don Contris purchased the compressors, refrigeration

units and the phibrico incinerator from Certified Meats. By letter dated July 31, 1974 Sue Hufford informed the Farmer and Merchants Bank that these items along with the used dicer which was sold to Joe Bushong & Sons were sold in order to make the last payments due on the promissory notes. It is not clear whether these items were sold in July or some time prior to that, but it is clear that Don Contris purchased part of the equipment of Certified Meats for its Country Pride operation, even though he testified to the contrary.

Hufford and Contris both testified that the stock was to be transferred from Contris to Sue Hufford. They also testified that they made arrangements early in June, 1973 with an attorney for the actual transfer of the stock. The record reflects however that it was not until December 18, 1973 that the actual transfer of the stock from Contris to Sue Hufford was actually completed. By this time, for all practical purposes, Certified Meats was a non-existing corporation. Country Pride in its answer contended that the Backpay Specification fails to state a claim; that the Board is without jurisdiction because no charge was filed; that Country Pride was not properly served with the original Backpay Specification, and as no judicial determination as to the successorship of Country Pride having been made, then the proceedings in the Seventh Circuit Court of Appeals is a necessary prerequisite to the filing of the amended Specification. The record reflects that on August 16, 1976 Sue Hufford on behalf of Country Pride was served with a copy of the original Backpay Specification

and Notice of Hearing. The remaining arguments of Respondents' need no comment. See Perma Vinyl Corporation, 164 NLRB 968.

Respondent's argue that there is no evidence that Country Pride purchased the business and continued the operation in privity with Certified Meats; that there never was a sale of the business, that Certified liquidated its assets and Country Pride started an entirely difference business, and because there was no sale of the assets no privity between the new and the old business existed and there was no successorship. And if there was no continuity of the business enterprise there is no liability upon the successor.

In Perma Vinyl Corporation, 164 NLRB 968, the Board stated:

> We are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged from under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.
>
> * * *
>
> In imposing this responsibility upon a bona fide purchaser we are not unmindful of the fact that he not a party to the unfair labor practices and continues to operate the business without any connection with his predecessor.
>
> * * *

> The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices.

In most successorship cases the purchasing employer is a stranger to the company that it purchases. Normally there is not an intimate relationship as exists in this case, and the company which takes over is not owned almost exclusively by the owner of the predecessor corporation. Here, Contris, the sole owner of Certified, owned 400 shares of the 600 shares of Country Pride.

Although both Hufford and Contris testified that there was a verbal agreement that Hufford would take over the operation of Certified there was in fact no transfer of stock until December of 1973. Therefore in my view Certified Meats was still in existence in September, 1973 when Country Pride moved into the Fort Wayne facility. Hufford who was an officer in both corporations in my view was merely acting as the operational head of Certified Meats during the period between June and September, 1973. There is no question that Certified Meats was a going corporation and in operation in September of 1973 when Country Pride moved into the Fort Wayne facility and began processing meat, with the same employees employed by Certified.

Assuming arguendo, the bona fides of the takeover by Hufford in June of 1973 and the takeover by Country Pride in September of 1973 there is no question that when Country

Pride began operation in September of 1973 in the Fort Wayne facility it was aware of the fact that Certified had unremedied unfair labor practices outstanding. While Country Pride may not have purchased the dead stock of Certified, it did purchase the physical assets such as the compressors, refrigeration units and the incinerator, which left the dicer as the only remaining asset of Certified. Additionally Certified hired the only two employees left on the payroll of Certified, and in my view continued in substantially the same business as that operated by Certified Meats. As indicated previously there was a lot of testimony and a lot of argument about the fact that Country Pride did not continue dicing beef. That it was engaged in the portioning of short ribs and the diced beef was a by-product. It is my conclusion that for all practical purposes Country Pride continued to engage in the same business as Certified in that it was engaged as a beef processor.

Under all the circumstances as set forth in this case and demonstrated by the record herein there is no doubt in my mind but that Country Pride is a successor to Certified Meats and jointly responsible for any unremedied unfair labor practices including any amounts of backpay accumulated during the period in which it continued to operate at the Fort Wayne facility. To conclude otherwise in this case would be an open invitation to fly-by-night organizations, when they are confronted with unremedied unfair labor practices to disband and open the next morning under a new name only, even though the ownership and the individuals continue to be the same and they continue in the same line of business.

Therefore it is my conclusion that Country Pride Inc., 7/ is jointly and severally responsible with Certified for remedying the unfair labor practices and making whole the employees in the amounts as found earlier in this decision.

7/ As indicated previously Country Pride is primarily engaged as a custom slaughterhouse for exclusive companies overseas, in France, Belgium and Holland. During the calendar year ending September 30, 1975, the gross sales for Country Pride were $1,349,557. Accordingly, I find that Country Pride is an employer within the meaning of the Act.

Upon the foregoing findings of fact, conclusions of law, I hereby issue the following recommended: 8/

ORDER

Respondent, Certified Meats, Inc., and its successor, Respondent, Country Pride, Inc., their officers, agents, successors and assigns shall jointly and severally make whole Donald Freeman, Charles Frye, Jerry Garman, Matt Hoeffel, Harris Hoeffel, Jr., Harris Hoeffel, Sr., William Longerbone, Harry Lung, John Thorpe, Victor Frye and Lesley McLain by paying to them the amount of money as net

8/ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

backpay set forth below opposite their name, plus interest thereon accrued to the date of payment to be computed in the manner prescribed in F. W. Woolworth Co., 90 NLRB 289 (1950) and Florida Steel Corp., 231 NLRB No. 117 (1977), 9/ less tax withholdings required by Federal and State law: 10/

Charles Frye	$1,352.49
Jerry Garman	1,012.35
William Longerbone	1,383.99
Harris Hoeffel, Jr.	1,082.43
Donald Freeman	1,281.14
Victor Frye	4,895.39
Matt Hoeffel	1,127.73
Harry Lung	809.68
Lesley McLain	1,650.19
John Thorpe	428.59

Dated, Washington, D.C. January 31,1978.

/s/
James T. Youngblood
Administrative Law Judge

9/ See generally Isis Plumbing & Heating Co., 138 NLRB 716 (1962)

10/ It is well settled that in successorship cases joint and several liability is appropriate. See Golden State Bottling Co., Inc., v. NLRB, 414 U.S. 168 (1973) and Crawford Door Sales Co., Inc., 226 NLRB No. 174 (1976).

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 1979, three (3) copies of the foregoing Supplemental Appendix to the Petition for Writ of Certiorari were mailed postage prepaid to Elliot Moore, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D. C. and three (3) copies to Solicitor General, Department of Justice, Washington, D. C. 20530.

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No. 79-752

In the Supreme Court of the United States

OCTOBER TERM, 1979

CERTIFIED MEATS, INC. AND COUNTRY PRIDE, INC.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 10-15) is not officially reported. The Board's supplemental decision and order (Supp. Pet. App. 1-38) is reported at 235 N.L.R.B. No. 184.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1979. The petition for a writ of certiorari was filed on November 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that Country Pride is a successor employer to Certified Meats and therefore the two companies are jointly and severally liable for remedying Certified Meats' unfair labor practices.

2. Whether petitioners were denied due process.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at page 2 of the petition. Also relevant is Section 8(a)(3):

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

STATEMENT

1. On October 17, 1972, the Board issued its decision and order in *Certified Meats, Inc.*, 199 N.L.R.B. 775, in which it found that Certified Meats violated Section 8(a)(3) and (1) of the Act by its discriminatory discharge of eleven employees. The Board ordered Certified Meats to offer reinstatement to two employees and to pay them as well as the nine others, who had been offered reinstatement, for any loss of earnings suffered because of the unlawful discharges. On August 3, 1973, the court of appeals enforced the order. *NLRB* v. *Certified Meats, Inc.*, 83 L.R.R.M. 2992 (7th Cir. 1973) (No. 73-1096). In

1978 the Board found that petitioner Country Pride, Inc., was a successor to petitioner Certified Meats and therefore was jointly and severally liable for remedying Certified Meats' unfair labor practices and making whole the employees in the amount of about $15,000. (Supp. Pet. App. 36-38).

Certified Meats began operations in February 1971 in Fort Wayne, Indiana, as a meat processor engaged in boning hams (Supp. Pet. App. 2, 29; Tr. 148).[1] William D. Contris, Karen Sue Hufford, and their attorney were the incorporators of Certified Meats and comprised the Board of Directors. Contris was Certified Meats' president, and Karen Hufford was its secretary-treasurer (Supp. Pet. App. 29; Tr. 148-149, 157-158). Contris owned 100 percent of Certified Meats' stock (Supp. Pet. App. 29; Tr. 158).

Country Pride was incorporated on April 20, 1972 in Creston, Ohio (Supp. Pet. App. 30; Tr. 148). Contris owns 400 of the 600 shares of Country Pride stock and Karen Hufford's brother, Steve Hufford, owns the remaining 200 shares (Supp. Pet. App. 30; Tr. 148, 159). At the time of the backpay hearing, Karen Hufford was the president and Contris was the secretary-treasurer of Country Pride (Supp. Pet. App. 30; Tr. 147-149, 360.)

In May or June of 1973, Certified Meats began processing diced beef for Country Pride which was its only customer for this service (Supp. Pet. App. 30; Tr. 152-154, 159-160, 197-200). Country Pride sold the meat to Stouffer Food, and other major customers (Tr. 153-154, 218-221, GCX 21-22). In mid-September 1973, Country Pride moved into the Fort Wayne plant. It

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[1] "Tr." references are to the transcript of the hearing below; "GCX" references refer to the General Counsel's exhibits therein.

bought substantially all of Certified Meats' physical assets and assumed Certified Meats' rent and utility payments, although the lease remained in Certified Meats' name and the utilities remained billed to Certified Meats (Supp. Pet. App. 31, 32-33; Tr. 168, 172-173, 187). Country Pride hired both of Certified Meats' remaining employees (Supp. Pet. App. 31, 36; GCX 13, 16). Country Pride produced a processed beef product similar to Certified Meats' and sold it to some of Certified Meats' customers (Supp. Pet. App. 32, 36; Tr. 166-174, 218-221, 229-239, GCX 21-26).

Country Pride continued to use Certified Meats' Department of Agriculture Inspection Number 6900. In February 1974, the Department of Agriculture rescinded this number due to temporary inactivity at the Fort Wayne plant. Karen Hufford wrote to the Department, at the behest of Contris, to have the number reinstated. Thereafter, Country Pride continued to use the number, which was registered in Certified Meats' name (Supp. Pet. App. 31-32; Tr. 163, 171-173, 183, 206-208, 223-226).

The administrative law judge, whose decision was adopted by the Board, rejected petitioners' argument that there was a hiatus between the time Country Pride took over the business and Certified Meats ceased operations (Supp. Pet. App. 2, 35). He also rejected the argument that since Country Pride diced beef only as a by product of its production of short ribs, there was no continuity of business enterprise. He concluded that "for all practical purposes Country Pride continued to engage in the same business as Certified [Meats] in that it was engaged as a beef processor" (Supp. Pet. App. 36).

2. The court of appeals upheld the Board's decision and enforced its order, stating that "[w]e have carefully and thoroughly examined the record as a whole and we conclude that substantial evidence supports the Board's finding that Country Pride is a successor employer" (Pet. App. 14). The court also rejected petitioners' contention that, due to the administrative law judge's interruption of their counsel during cross-examination, they were denied a fair hearing (*ibid.*).

ARGUMENT

1. Petitioners challenge (Pet. 4-6) the sufficiency of the evidence for a finding that Country Pride is the successor to Certified Meats. In *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 (1973), this Court held that the Board may require a successor employer to remedy a predecessor's unfair labor practices where the successor acquired the business with knowledge of the predecessor's unfair labor practices and where "substantial continuity" of the identity of the business enterprise is maintained. Petitioners essentially maintain that the latter condition was not met because Certified Meats was "defunct" before Country Pride took over the business. The Board, upheld by the court of appeals, found that the evidence did not support that claim. Resolution of that issue presents only an evidentiary issue which does not warrant review by this Court. *Universal Camera* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Petitioners' reliance on *Textile Workers* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), is misplaced. In *Darlington*, stockholders approved the board of directors' decision to liquidate the corporation, and plant machinery and equipment was sold piecemeal at auction. *Id.* at 266. In contrast here, after Certified Meats' unfair

labor practice hearing (at which they were witnesses). Certified Meats' two main principals organized another corporation which bought substantially all of Certified Meats' physical assets and produced similar beef products some of which were sold to some of Certified Meats' former customers.[2]

2. Petitioners' additional contention that they were denied a fair hearing because of the interruption by the administrative law judge similarly raises no issue warranting further review. As the court of appeals noted, "petitioners * * * are unable to cite a single authority in direct support of the assertions[3] and they fail to point out a specific instance where the administrative law judge prevented counsel from obtaining testimony from a witness" (Pet. App. 14).

Petitioners also contend (Pet. 8) that the judge was "biased" because he allegedly withdrew from the case and then reconvened the hearing. However, the record reveals nothing which indicates bias. At one point in the hearing, the judge did respond to counsel for petitioner's protest of his questioning witnesses and request that he withdraw from the case by stating that he would do so (Tr. 313-314). However, after a ten-minute recess, during which the judge consulted with another administrative

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[2]Although Certified Meats ceased dicing beef for more than thirty days (because of a beef shortage due to a farmers' strike prior to Country Pride's takeover). Certified Meats retained two employees on the payroll in anticipation of resuming production, and both employees were immediately hired upon Country Pride's acquisition of the business (Supp. Pet. App. 31; Tr. 201-203, GCX 13, 16).

[3]Such conduct in fact does not amount to denial of a fair hearing. See, *e.g.*, *NLRB* v. *Air Flow Sheet Metal, Inc.*, 396 F. 2d 506, 508 (7th Cir. 1968); *NLRB* v. *Superior Sales, Inc.*, 366 F. 2d 229, 233 (8th Cir. 1966).

law judge, he determined to continue with the hearing and advised petitioners that they could renew their motion before the Board (Tr. 315-317). The judge's immediate reversal of his prior ruling, without more, hardly indicates bias.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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